



**Abdalla & another v Atembe & 2 others (Civil Appeal  
E267 of 2023) [2024] KEHC 8364 (KLR) (5 July 2024) (Ruling)**

Neutral citation: [2024] KEHC 8364 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAKURU  
CIVIL APPEAL E267 OF 2023**

**HM NYAGA, J**

**JULY 5, 2024**

**BETWEEN**

**ABDALLA SALIM ABDALLA ..... 1<sup>ST</sup> APPLICANT**

**SHEM NG'ANG'A ..... 2<sup>ND</sup> APPLICANT**

**AND**

**BEATRICE MORAA ATEMBE ..... 1<sup>ST</sup> RESPONDENT**

**PAN AFRICA LOGISTICS LIMITED ..... 2<sup>ND</sup> RESPONDENT**

**RAMADHAN WEKESA KASSIM ..... 3<sup>RD</sup> RESPONDENT**

**RULING**

1. *Vide* a notice of motion dated November 21, 2023, the applicants herein seek orders that;
  - a. Spent.
  - b. Spent.
  - c. That this honourable court be pleased to order a Stay of Execution of the Judgement delivered in the Lower Court on September 6, 2023 pending the hearing and determination of the Appeal.
  - d. That as a condition for stay of execution pending appeal, they be ordered to provide or issue security for the entire decretal sum/amount in the form of a Bank Guarantee to be issued by Family Bank Limited.
  - e. That the costs of this application abide by the outcome of the appeal.
2. The application is predicated on the following grounds:-



- a. That Judgement was delivered in Nakuru CMCC No. 1539 of 2018 on 6<sup>th</sup> September, 2023 and Liability determined in CMCC No. 1208/2018 at 100% has been appealed in Nakuru HCCA No. E103/2023, General damages of Ksh.500,000/=, Special Damages of Ksh.8,650/= and Loss of Earnings of Ksh 100,000/= and costs and interests was awarded.
  - b. That being aggrieved by the said judgement they preferred the instant Appeal.
  - c. That the Appeal has high chances of success.
  - d. That the Application has been filed without inordinate delay.
  - e. That the Respondent is a man of unknown means hence the Applicants are apprehensive that if the decretal sum is paid out, the appeal will be rendered an academic exercise.
  - f. That the Applicants are ready, able and willing to provide security for the entire decretal sum in the form of a Bank Guarantee to be issued by Family Bank Limited which is a reputable bank in Kenya.
  - g. That to facilitate the issuance of the said Bank Guarantee as security, the Applicant's insurer, M/S Direct line Assurance Company, have a long standing agreement with Family Bank.
  - h. That it is in the interest of justice that the entire decretal sum be fully secured through a Bank Guarantee as the Applicants' appeal is primarily liability which is vehemently disputed as demonstrated on the Memorandum of Appeal.
  - i. That the Appellants are reasonably and justifiably apprehensive that if any decretal sum is paid as a condition for stay of execution pending appeal, such payments will be utilized and alienated by Respondents and recovery of the same will be arduous in the event the Appeal on quantum succeeds.
3. The Application is supported by an affidavit sworn by the 1<sup>st</sup> Applicant on the even date. Therein, he has reiterated the above grounds and annexed a copy of the said Judgement, Memorandum of Appeal and a copy of the Bank Guarantee in which Family Bank has agreed to provide such security pending the determination of the appeal.
  4. In response to the application, the 1<sup>st</sup> Respondent's Advocate, Cheruiyot Moses, through his replying affidavit sworn on December 19, 2023, averred that the application is misconceived, incompetent, unmerited, an abuse of the court process and it should be dismissed.
  5. He deposed that the Applicants have filed this Application quite late in the day and in a hurried bid to stall execution.
  6. He averred that upon serving the Applicants with costs, the Applicants promised the 1<sup>st</sup> Respondent to pay until when they were served with the instant application and a memorandum of Appeal which was filed on September 26, 2023 whereas the same was never served upon them but annexed in this Application in a bid to steal a match from the 1<sup>st</sup> Respondent.
  7. He deposed that the Application has not met the threshold for grant of stay of execution pending appeal.
  8. He asserted that the bank guarantee proposed is not specific to the 1<sup>st</sup> Respondent, the bank is not party to this proceeding and will not be bound should payment be required and that it is for one year thus prejudicial to the 1<sup>st</sup> Respondent as it is uncertain when the Appeal will be concluded.



9. He deposed that should the court be inclined to allow the Application, then the same should be on condition that the Applicants releases half of the decretal sums payable to the 1<sup>st</sup> Respondent and the other half be deposited in court.
10. On January 29, 2024, I gave directions for disposal of the application through written submissions. On April 15, 2024, the Applicants' counsel told court that they had filed their submissions whereas the Respondent's counsel stated that they will rely on their replying affidavit. The Applicants' submissions are not on record.

### **Analysis & determination**

11. Having considered the application, grounds, affidavits, submissions and authorities cited, it is my considered view that the following issues fall for determination: -
  - a. Whether the Applicants have met the threshold for grant of stay pending appeal
  - b. What would be the most appropriate security to grant under the circumstance?

### **Whether the Applicants have met the threshold for grant of stay pending appeal**

12. Order 42 rule 6(2) of the [Civil Procedure Rules](#) provides:

“(2) No order for stay of execution shall be made under subrule (1) unless—

- (a) the court is satisfied that substantial loss may result to the applicant unless the order is made and that the application has been made without unreasonable delay; and
- (b) such security as the court orders for the due performance of such decree or order as may ultimately be binding on him has been given by the applicant.”

13. In the case of [Butt v Rent Restriction Tribunal](#) [1982] KLR 417 the court of Appeal gave guidance on how a court should exercise discretion in an application of stay of execution and held that:

“The power of the court to grant or refuse an application for a stay of execution is a discretionary power. The discretion should be exercised in such a way as not to prevent an appeal.

The general principle in granting or refusing a stay is; if there is no other overwhelming hindrance, a stay must be granted so that an appeal may not be rendered nugatory should that appeal court reverse the judge's discretion.

A judge should not refuse a stay if there are good grounds for granting it merely because in his opinion, a better remedy may become available to the applicant at the end of the proceedings.

The court in exercising its discretion whether to grant [or] refuse an application for stay will consider the special circumstances of the case and unique requirements. The special circumstances in this case were that there was a large amount of rent in dispute and the appellant had an undoubted right of appeal.



The court in exercising its powers under order xli rule 4(2)(b) of the Civil Procedure Rules, can order security upon application by either party or on its own motion. Failure to put security for costs as ordered will cause the order for stay of execution to lapse.”

14. In *Visbram Ravji Halai v Thornton & Turpin* Civil Application No. Nai. 15 of 1990 [1990] KLR 365, the Court of Appeal held that whereas the Court of Appeal’s power to grant a stay pending appeal is unfettered, the High Court’s jurisdiction to do so under order 41 rule 6 of the *Civil Procedure Rules* is fettered by three conditions namely, establishment of a sufficient cause, satisfaction of substantial loss and the furnishing of security. Further the application must be made without unreasonable delay.
15. With the above in mind, the Court must then determine what substantial loss the appellants will suffer if stay of enforcement of the judgment of the subordinate court is not made in their favour.
16. On whether the Appellants will suffer substantial loss, substantial loss would entail what was aptly discussed by Kimaru, J in *Century Oil Trading Company Ltd v Kenya Shell Limited* Nairobi (Milimani) HCMCA No. 1561 of 2007 where he stated that:

“The word “substantial” cannot mean the ordinary loss to which every judgement debtor is necessarily subjected when he loses his case and is deprived of his property in consequence. That is an element which must occur in every case and since the Code expressly prohibits stay of execution as an ordinary rule it is clear the words “substantial loss” must mean something in addition to all different from that...Where execution of a money decree is sought to be stayed, in considering whether the applicant will suffer substantial loss, the financial position of the applicant and that of the respondent becomes an issue. The court cannot shut its eyes where it appears the possibility is doubtful of the respondent refunding the decretal sum in the event that the applicant is successful in his appeal. The court has to balance the interest of the applicant who is seeking to preserve the status quo pending the hearing of the appeal so that his appeal is not rendered nugatory and the interest of the respondent who is seeking to enjoy the fruits of his judgement.”

17. In the instant case the Applicants claim that they will suffer substantial loss should execution proceedings commence against them as their appeal will be rendered nugatory and they may not be able to recover the decretal sum from the 1<sup>st</sup> respondent as her means of income is unknown. The Respondent in her response failed to file an affidavit of means to demonstrate her ability to refund any sums that may be paid to her in case the appeal succeeds.
18. In the case of *G. N. Muema P/A (sic) Mt. View Maternity & Nursing Home v Miriam Maalim Bisbar & another* [2018] eKLR, the Court stated as follows: -

“It was the considered view of this court that substantial loss does not have to be a lot of money. It was sufficient if an applicant seeking a stay of execution demonstrated that it would have to go through hardship such as instituting legal proceedings to recover the decretal sum if paid to a respondent in the event his or her appeal was successful. Failure to recover such decretal sum would render his appeal nugatory if he or she was successful.”



19. In the case of *National Industrial Credit Bank Ltd v Aquinas Francis Wasike & another* [2006] eKLR, the Court of Appeal held thus:
- “Once an applicant expresses a reasonable fear that a respondent would be unable to pay back the decretal sum, the evidential burden must then shift to the respondent to show what resources he has since that is a matter which is peculiarly within his knowledge...”
20. Guided by the above authorities and in the absence of the requisite proof that the Respondent is a person of means, I find that the Applicants have sufficiently demonstrated that they stand to suffer substantial loss if any decretal sum is paid to the Respondent before the appeal is heard and determined. The Appellant has therefore fulfilled the first condition.
21. In regards to whether this Application has been filed without unreasonable delay, the subordinate court’s judgment was indisputably delivered on 6<sup>th</sup> September, 2023 and the instant application was filed on November 23, 2023. The same ought to have been filed on or before October 6, 2023 and the Applicants have not advanced any reasons for failure to do so. The application herein was therefore not filed timeously.
22. With regards to security, the Applicants have shown willingness to offer security by way of a bank guarantee for due performance of the decree.
23. With regard to whether the appeal is arguable, I am alive to the fact that in deciding an application of this nature, the court must be careful not to delve into the merits of the case as that is under the purview of the appellate court after hearing the merits of the same. The court should therefore only be concerned with the question of whether or not the appeal will be rendered nugatory.
24. A cursory look at the Memorandum of Appeal shows that the grounds raised therein are against liability and quantum.
25. A perusal of the lower court judgement shows that there was a test suit that was used to determine the question of liability. The suit herein was only heard on the issue of assessment of quantum of damages.
26. The essence of considering whether the appeal raises triable issues is to avoid the same being rendered nugatory should the decision of the appellate court overturn that of the trial court.
27. The practice in cases like this one is that once the question of liability in a test suit is determined by a court, the other suits need not be heard by the same court. The assessment of damages can be heard by any other court and this is what happened herein.
28. The Applicants averred that Liability determined at 100% in CMCC No. 1208/2018 and has been appealed in Nakuru HCCA No. E103 of 2023. That cannot be the truth, as the judgment in question clearly stipulates that liability in the test suit was apportioned at 50% against the 1<sup>st</sup> and 2<sup>nd</sup> defendants and at 50% against the 3<sup>rd</sup> and 4<sup>th</sup> defendants respectively.
29. Therefore, in this appeal the question of liability is not in dispute. That is the subject of the appeal against the judgment in the test suit.
30. As regards the Appeal on assessment of damages, the grounds raised in the memorandum of appeal are triable and I believe those grounds are sufficient to find that the intended Appeal is arguable.
31. The three (3) prerequisite conditions set out in the aforesaid order 42 rule 6 of the *Civil Procedure Rules, 2010* cannot be severed. The key word is “and”. It connotes that all three (3) conditions must be



met simultaneously. In the case of *Trust Bank Limited v Ajay Shah & 3 others*, [2012] eKLR at page 23 the court stated that;

“The conditions set out in order 42 rule 6(2) (a) and (b) are cumulative. All the three must be satisfied before a stay can be granted. The Applicant only satisfied one condition and failed to satisfy the others. For the foregoing reasons, I find that the Plaintiff’s Notice of Motion dated April 24, 2012 it without merit.”

32. In the instant case the Applicants have satisfied two conditions. However, noting that extension of time is an equitable remedy, I hold that the Respondents can be adequately compensated in costs for any prejudice that may be suffered as a result of the exercise of discretion in favour of the Applicants. I find that no prejudice will be caused to the Respondents that cannot be compensated by an award of costs if the Application is allowed.

**What would be the most appropriate security to grant under the circumstance?**

33. The Applicants proposes a provision of a bank guarantee of the entire decretal sum while the 1<sup>st</sup> Respondent proposes that half of the decretal sum be paid to her and the other half to be deposited in court.
34. I have considered the arguments in regards to provision of the bank guarantee as security. The said guarantee is a general one, valid for 12 months with an option to renew. It is not shown that this guarantee is specific to this suit. Thus, with hundreds or even thousands of claims to be covered by the applicants’ insurer, the said guarantee is of little comfort to the respondent.
35. In determining the security, the court has to strike a balance on the interests of the appellant and those of the respondent. In doing so, the court exercises a discretion which must at all times be geared towards the achievement of the justice between the parties. This was set out in the case of *Henry Sakwa Maloba v Bonface Papando Tsabuko* (2020) eKLR where the High Court reiterated the finding in the case of *Century Oil Trading Company Limited v Kenya Shell Limited* Nairobi (2008) eKLR, where the latter stated:

“Where execution of a money decree is sought to be stayed, in considering whether the applicant will suffer substantial loss, the financial position of the applicant and that of the respondent becomes an issue. The court cannot shut its eyes where it appears the possibility is doubtful of the respondent refunding the decretal sum in the event that the applicant is successful in his appeal. The court has to balance the interest of the applicant who is seeking to preserve the status quo pending the hearing of the appeal so that his appeal is not rendered nugatory and the interest of the respondent who is seeking to enjoy the fruits of his judgment”.

36. Having considered the matter, I think that justice demands that the applicants be allowed to prosecute this appeal if only on quantum. I therefore find that the application dated November 21, 2023 is merited and order as follows;
- a. That execution of the judgment and the ensuing Decree in Nakuru CMCC No. E1539 of 2018 be and is hereby stayed pending the hearing and determination of the appeal on condition that the applicant pays half the decretal sum to the respondent within 45 days of the date hereof;
  - b. For the avoidance of doubt, the half decretal sum is half of the sum payable by the applicants under the liability of 50% apportioned to them in the test suit.



- c. The balance of the decretal sum payable by the applicants to be deposited in a joint interest earning account in the name of the advocates herein within 45 days of the date hereof;
- d. In default of any of the orders in (a) and (b) above the stay orders shall lapse automatically without further reference to the court and the respondent shall be at liberty to execute.
- e. The appellant/applicant shall prepare, file and serve the record of appeal within 60 days from the date hereof.
- f. Costs of this application shall abide the appeal.

**DATED, SIGNED AND DELIVERED AT NAKURU THIS 5<sup>TH</sup> DAY OF JULY, 2024.**

**H. M. NYAGA**

**JUDGE**

In the presence of;

Court Assistant Jamleck

Ms Chemutai for Applicant

No appearance for Respondent

